Nos. 82-185, 82-246, 82-259

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
*Petitioner,*
vs.
BOSTON CHAPTER, NAACP, et al.,
*Respondents.*

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
*Petitioner,*
vs.
PEDRO CASTRO, et al.,
*Respondents.*

NANCY B. BEECHER, et al.,
*Petitioners,*
vs.
BOSTON CHAPTER, NAACP, et al.,
*Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

## BRIEF FOR THE OFFICERS FOR JUSTICE; INTERNATIONAL ASSOCIATION OF BLACK FIREFIGHTER—SAN FRANCISCO CHAPTER; THE BLACK AGENDA COUNCIL; THE ASSOCIATION OF NORTHERN CALIFORNIA BLACK WOMEN LAWYERS; THE HONORABLE WILLIE L. BROWN; THE WILLIAM HASTIE BAR ASSOCIATION; THE CHARLES HOUSTON BAR ASSOCIATION; AND THE KAPPA ALPHA PSI FRATERNITY, IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICI CURIAE

The common bond linking all amici in this brief is a commitment to the protection and advancement of the civil rights of minorities.

The instant case involves a federal court's exercise of discretion to prevent institutionalization of past discriminatory employment practices. Amici believes that this appeal is moot, but in the event that the Court reaches the merits, it is imperative that it affirm the trial court's

authority to modify its consent decrees in the way it did. In a time of deep recession and shrinking economic resources, black Americans and other minority groups already experience a disproportionately high level of unemployment. These groups cannot afford to undergo, and they should not be required to undergo, layoffs which would eliminate recently acquired civil rights gains and reinstate the discriminatory, status quo ante.

Officers for Justice is an organization comprised of minority members of the San Francisco Police Department and was formed in order to deal with the issue of minority underrepresentation in the San Francisco Police Department and to combat discrimination aimed at those minorities who are members of the police force. The organization has been involved in landmark litigation aimed at desegregation of the police force of San Francisco and has obtained a consent decree providing for affirmative action in the hiring and promotion of police officers. The preservation of the remedial impact of consent decrees designed to eliminate the present effects of past discrimination is of continuing concern to this organization.

The International Association of Black Firefighters-San Francisco Chapter—is an organization of black professional firefighters which recruits blacks into the fire department, assists blacks in achieving promotions within the department, and makes the fire service more relevant to the needs and aspirations of Blacks and of other minority citizens within San Francisco.

The Black Agenda Council which was established in 1982 is a San Francisco network of elected and appointed officials representing more than 30 black organizations. The Council is concerned with all issues affecting blacks in San Francisco and across the country and regards the issue of black employment as of paramount concern.

The Association of Northern California Black Women Lawyers represents the interests of black women lawyers.

The Association is vitally concerned with the advancement of all minority Americans.

The Honorable Willie L. Brown is the Speaker of the Assembly of the California State Legislature. He is appearing here in his individual capacity. His legal and political career has been devoted in large part to promoting equal opportunity for minority Americans including equal employment opportunities.

The William Hastie Bar Association is an organization of San Francisco-based black attorneys which includes increased employment opportunities for black Americans as one of its goals.

The Charles Houston Bar Association is the oldest association of black attorneys in Northern California. The Association has filed a number of amici briefs before this Court on a variety of issues affecting the black community. Named after one of the most distinguished deans of Howard University Law School, the Association strives to use the talents of black attorneys to advance the general interests of black Americans.

The Kappa Alpha Psi Fraternity is an organization of some 70,000 black Americans concerned with all aspects of minority affairs in this country. Long active in struggles aimed at improving the lot (economic and otherwise) of black Americans, Kappa Alpha Psi believes that the future of consent decrees designed to alleviate the effects of past discrimination is of critical importance to its membership and to all black Americans.

Because of their involvement in efforts to ensure equal employment opportunity for minority Americans and because it is their belief that the District Court's modification of the consent decrees herein was an essential step in the process of realizing this goal, amici file this brief in support of respondents.[1]

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[1]The parties' letter of consent to the filing of this brief are being lodged with the Clerk pursuant to Rule 36.1.

## ARGUMENT

### I.

### THIS APPEAL IS MOOT

A case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, ..... U.S. ....., 102 S.Ct. 1181, 1182-83, ..... L.Ed.2d ..... (1982); *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980); *Powell v. McCormack*, 395 U.S. 486, 496 (1969). On this appeal, petitioners complain that the District Court's modification of its original consent decrees wrongfully deprived certain white protective service employees of their jobs in 1981. Subsequent to this Court's grant of the writs of certiorari, the Boston police and fire departments reinstated all laid off personnel and thereby mooted this appeal.

Petitioners would have this Court believe that this appeal encompasses the issues of backpay and seniority credit for the period covered by the allegedly wrongful furloughs. No such claims were raised in the courts below, though they could *easily* have been anticipated and argued. Rather, petitioners limited their arguments to the proposition that the District Court's modification of the original consent decrees should be vacated so that certain white protective service employees could be recalled to their jobs. This is precisely what has occurred since this Court granted certiorari. This appeal is therefore moot. *DeFunis v. Odegaard*, 416 U.S. 312, 316-17 (1974).

## II.

## THE DISTRICT COURT ACTED PROPERLY IN MODIFYING THE ORIGINAL CONSENT DEGREES

### A. The District Court Was Authorized To Modify The Original Consent Decrees Because Of Changed Circumstances

Since the original consent decrees were directed to future events which could not fully be anticipated at the time the decrees were entered, the District Court appropriately retained jurisdiction to shape, revise or modify the decrees. As this Court recognized in *United States v. Swift*, 286 U.S. 106, 114 (1932), "[a] continuing decree or injunction directed to events to come is subject to adaptation as events may shape the need." The Court reasoned that:

> [C]onsent is to be read as directed toward events as they were then. It was not an abandonment of a right to exact revision in the future, if revision should become necessary in adaptation to events to be." 286 U.S. at 115.

*Accord, United States v. United Shoe Machinery Corporation*, 391 U.S. 244, 248 (1968); *Federation v. Wright*, 364 U.S. 642, 647 (1961); *Chrysler Corporation v. United States*, 316 U.S. 556, 562 (1942).

The District Court's modification of the original decrees was not just authorized, it was *required*. After finding that minorities were severely underrepresented in the Boston police and fire departments as a result of discriminatory conduct and after approving consent decrees which required that this situation be corrected in the future, the District Court was obligated to ensure that the City of Boston complied with the original decrees with all deliberate speed.

As this Court held in the antitrust case of *United Shoe, supra*, 391 U.S. at 252, a district court, upon an appropriate

finding that unlawful practices had not been eliminated, should modify a consent decree "to achieve the required result *with all appropriate expedition*" (emphasis added). In *United Shoe*, the district court denied the government's petition for a modification of a consent decree, even though the government demonstrated that the defendant was still engaged in monopolistic practices. This Court reversed after concluding that it was "the duty of the court to prescribe relief which will terminate the illegal monopoly, deny the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future." *Id.* at 250. Similarly, in *Federation, supra*, 364 U.S. 642, the District Court's denial of a union's motion to modify a consent decree was held by this Court to constitute an abuse of discretion.

Where, as here, the District Court has granted a request for modification of a consent decree after a full evidentiary hearing, the propriety of the modification is tested by determining whether it "effectuates or thwarts the basic purpose of the decree." *Chrysler, supra*, 316 U.S. at 562. In this case, the District Court's action not only promoted the objectives of the original decrees but was absolutely required in order to prevent those decrees from being rendered meaningless.

Thus, the original consent decrees called for a substantial increase in the percentage of minority police officers and firefighters in Boston and established as a target the level of minority representation in the City of Boston. *Boston Chap., NAACP v. Beecher*, 679 F.2d 965, 968, 969 (1 Cir. 1982) [hereinafter cited as "NAACP v. Beecher"]. Compliance with these decrees produced significant improvement in the level of minority representation in both departments, although it still remained well below the target established in the decrees. *Id.* at 970.

The proposed layoffs according to strict seniority would have rolled back minority representation in both depart-

ments substantially. *Id.* Not surprisingly, both of the courts below concluded that the only effective way to preserve the viability of the original decrees was to limit the extent to which minorities could be laid off. *Id.* at 977; *Castro v. Beecher,* 522 F.Supp. 873, 877 (D. Mass. 1981).

**B. The District Court's Modification Of The Original Consent Decrees Was Not Barred By Section 703(h) Of Title VII**

Petitioners invoke section 703(h) of Title VII (42 U.S.C. 2000e-2(h)) as the basis for their argument that the District Court had no authority to override the Massachusetts seniority statute (Mass. Gen. Laws c. 31, et seq.) in order to effectuate the original consent decrees. The police case did not, however, involve Title VII at all and Title VII was not the principle statute involved in the fire case. In both cases, 42 U.S.C. § 1981 was the key statute as the Court of Appeals' opinion clearly indicates. *NAACP v. Beecher, supra,* 679 F.2d at 967, 968.

Conceding this, as they must, petitioners assert that Title VII and 42 U.S.C. § 1981 are identical statutes and that the limitations on the relief available under the former necessarily operate to limit the relief available under the latter, even where the relief in question is the product of consent decrees *voluntarily* entered into by the parties. Significantly, petitioners make no effort to support these contentions with citations to the legislative history of Title VII, undoubtedly because it offers them no comfort.

In *Bolden v. Pennsylvania State Police,* 578 F.2d 912 (3 Cir. 1978), a similar argument was made and rejected on the ground that the legislative history of Title VII did not support the proposition that section 703(h) limited the relief available under 42 U.S.C. § 1981. There, an association of state police officers sought modification of an affirmative action consent decree that eliminated seniority from the criteria relevant to promotion decisions. The

association argued that three cases decided under section 703(h) after the consent decrees were entered rendered the decrees unlawful. In rejecting the argument, the court observed that:

> [*T*]*he statute involved in the three recent decisions, Title VII . . ., was not the predicate for relief in this case. Before we could find those cases relevant here, we would have to impute to the Second Session of the Eighty-eighth Congress the intention to circumscribe the remedial powers of the federal court under §§ 1981, 1983, 1985 and 1988.* We find nothing in *Franks . . . , International Brotherhood of Teamsters . . .*, or *United Airlines, Inc. v. Evans* to support such a construction of 703(h) of Title VII. *Nothing in the legislative history of that section supports it.* 578 F.2d at 921 (emphasis added).

Petitioners stress that it is "illogical" for the remedial powers of the federal courts under section 1981 to be treated any differently than their remedial powers under Title VII but they offer no explanation for the fact that Congress failed to follow their "logic" by explicitly limiting the remedial powers of the courts under section 1981 to the types of remedies available under Title VII. This Court's decision in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), makes it clear that the two statutes are distinct and that the scope of the courts' remedial powers under section 1981 cannot be determined by extrapolation from Title VII. "[*T*]*he remedies available under Title VII and under § 1981*, although related, and although directed to most of the same ends, *are separate, distinct, and independent.*" 421 U.S. at 461 (emphasis added).

Petitioners' claim that the District Court's modification of the original consent decrees was prohibited by section 703(h) of Title VII is defective for the additional reason that Title VII does not limit, and cannot be construed to limit, the scope of relief which the parties to an action can voluntarily decide upon. The court in *EEOC v.*

*Safeway Stores, Inc.*, 611 F.2d 795 (10 Cir. 1979), addressed this issue and concluded that a consent decree was not objectionable simply because it provides more relief than Title VII provides. In that case, individual members of a union sought to modify an affirmative action consent decree on the ground that the decree exceeded the relief provided for in Title VII. The appellate court concluded that the trial court had properly refused to modify the consent decrees.

> [T]o argue that the terms of a consent decree may not vary from the statutory limits of Title VII is to misconceive the nature of consent decrees and to ignore the strong policy embodied in Title VII in favor of voluntary settlements. . . .
>
> It is not the purpose of Rule 60(b) or the inherent powers of chancery to allow the modification of a consent decree merely because it reaches a result which could not have been forced on the parties through litigation. 611 F.2d at 799-800 (citations omitted).

Thus, the mere fact that original consent decrees afford more relief than might have been allowed in a fully litigated case does not render the District Court's decision to preserve the decrees improper.

### C. A Finding Of Intentional Discrimination Was Not A Prerequisite For The District Court's Modification Of The Original Consent Decrees

Petitioners do not, for obvious reasons, go so far as to attack the validity of the original consent decrees.[2] They

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[2]None of the original defendants in these cases and none of the unions has ever filed a motion for relief from the original consent decrees. On that basis alone, petitioners would be barred from collaterally attacking the decrees on this appeal. *Cf., Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375 (1940). In addition, however, an intervening change in the law concerning proof of liability under 42 U.S.C. § 1981 does not support the type

do, however, argue that by virtue of this Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), the District Court could not "extend" the relief of the original decrees by limiting layoffs of minority protective service employees. According to petitioners, this "additional" relief cannot be granted absent a finding of intentional discrimination. This argument necessarily depends on the assumption that the District Court did something other than enforce the explicit terms of the original decrees, an assumption which is completely untenable.

The original decrees embody agreements between the parties that certain steps would be taken to improve minority representation in the Boston police and fire departments, including accelerated minority hiring. The decrees establish a goal in this regard—i.e., minority representation in these departments was to be increased until it approximated the level of minority representation in the City of Boston. The agreements are not contingent upon the state of the law under 42 U.S.C. § 1981 or under any other statute. There are no provisions in the decrees which excuse failure to perform whether it is caused by financial necessity or by any other circumstance.

The City of Boston's proposed program of layoffs according to strict reverse seniority would have violated the original consent decrees in two respects. First, the proposed layoffs would have deprived minorities of the relief provided thusfar by depriving them of their jobs. Second, the proposed layoffs would have blocked the prospective relief called for by the decrees by hampering the effort to increase minority representation in the police and fire

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of relief petitioners seek on this appeal—layoffs of minorities hired pursuant to the original decrees. Precedential evolution, standing alone, will not justify recision of relief already provided. *EEOC v. Safeway Stores, Inc.*, 611 F.2d 799, 800 (10 Cir. 1979); *Mayberry v. Maroney*, 558 F.2d 1159, 1164 (3 Cir. 1977).

departments to the level of minority representation in the surrounding community. Even assuming that the proposed layoffs are not motivated by an intent to discriminate against minorities, this is totally irrelevant because nothing in the original consent decrees excuses any failure to perform.

On virtually identical facts, the court in *Bolden v. Pennsylvania State Police*, 73 F.R.D. 370 (E.D. Pa. 1976), rejected the contention that absence of an intent to discriminate excused conduct on the part of the defendants that violated the terms of a consent decree. There, personnel reductions were interfering with the affirmative action plan required by the decree and a modification of the consent decree was sought to correct the situation. The defendants in *Bolden* argued, as petitioners do here, that the modification of the decree was impermissible under *Washington v. Davis* because there was no proof that the reductions in force were motivated by an intent to discriminate against minorities. The district court dismissed this contention.

> *It is important to point out that plaintiffs do not require a remedy for acts of discrimination subsequent to the Decree. Plaintiffs seek only a modification of the Decree in order to remedy pre-decree deprivations of their constitutional rights* by admittedly racially discriminatory conduct on the part of the State Police. *Certainly under the facts of this case, Washington v. Davis is inapposite.* 73 F.R.D. at 371-72 (emphasis added).

Similarly, in *Sarabia v. Toledo Police Patrolman's Association*, 601 F.2d 914 (6 Cir. 1979), a district court's modification of a consent decree was upheld notwithstanding a purported change in the law since the decree was entered. In *Sarabia*, a union claimed that *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), required proof of intent to

discriminate before the consent decree could be modified to limit layoffs of minorities. In rejecting the argument, the appellate court observed:

> It is hard to understand how these decisions could be applied to a case involving a consent decree. Here, the parties agreed that certain steps would be taken "to erase any vestiges of past employment discrimination. . . ." When this agreement was submitted and entered by the court as a consent decree all issues of proof were dispensed with. *Whatever may have been the understanding of the parties with respect to the requirements for proving a constitutional violation at the time of the decree, they all agreed upon a course of conduct to bring about a better representation of minority groups on the Toledo police force.* This agreement was solemnized at their request by entry as an order of the district court. *The district court did not violate Washington v. Davis or Arlington Heights by entering a subsequent order to effectuate the stated goal of the consent decree.* 601 F.2d at 919 (emphasis added).

*Stotts v. Memphis Fire Department*, 679 F.2d 541 (6 Cir. 1982), also addresses this issue and reaches the same conclusion as the courts in *Bolden* and *Sarabia*. In *Stotts*, the City of Memphis argued that the district court erred in modifying affirmative action consent decrees and limiting proposed layoffs of minorities. The City's position was that it should be excused from performance of the obligations set forth in the original decree because the layoffs were precipitated by a fiscal crisis. The appellate court affirmed the district court's modification of the decree. It concluded that the announcement of the proposed layoffs "was in effect notice of the City's intended anticipatory repudiation of the 1974 and 1980 Decrees" in that ". . . relief previously granted pursuant to the Decrees would be diminished and . . . prospective relief under the Decrees

would not be forthcoming." 679 F.2d at 561. The appellate court went on to hold that:

> *Plaintiffs were presumptively entitled to full performance of the terms of the Decrees.* Therefore, the court's modification of the [decrees] is simply an exercise of its equity jurisdiction to temporarily relieve the hardship on the City which strict compliance with the decrees would have caused. The modification allows the City to proceed with its layoff policy subject to reasonable deference to its obligations under the decrees. *Id.* at 562 (emphasis added).

The instant cases are not different in any significant respect from the cases discussed above. The City of Boston made a commitment to increase minority representation in the police and fire departments and, just as it had begun to fulfill its obligations, it attempted to renege on its agreement because of an asserted fiscal crisis. Nothing in the original consent decrees excused such an attempted repudiation of the City's obligations and, in particular, no provision limits the decrees to situations in which the City is motivated by an intent to discriminate. It was therefore no violation of *Washington v. Davis* to modify the decrees and limit layoffs of minorities.

Petitioners' reliance on *Washington v. Davis* is mi[illegible]d for an additional reason: it is distinguishable from the cases at bar. The sole issue before this Court in *Washington* was whether proof of intentional discrimination is required in order to establish a violation of the Equal Protection Clause. The plaintiffs in *Washington* alleged violations of 42 U.S.C. § 1981 but, on appeal, only raised the Equal Protection Clause issue. "Having lost on both constitutional and statutory issues in the District Court, respondents brought the case to the Court of Appeals claiming that their summary judgment motion, *which rested on purely constitutional grounds,* should have been granted." 426 U.S. at 236 (emphasis added). The appellate court reversed the

district court and, when it, in turn, reversed the appellate court, this Court stated that its decision was based upon the fact that "the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the *constitutional* issue before it." *Id.* at 238 (emphasis added).[3]

There is no constitutional claim under the Equal Protection Clause in either of the cases at bar. They were brought only under 42 U.S.C. § 1981 and Title VII. *Washington* cannot be construed to apply to cases brought under either of those statutes and the court in *Davis v. County of Los Angeles*, 566 F.2d 1334 (9 Cir. 1977), agrees.

> It is significant that throughout this discussion of "constitutional standards" and "Constitution-based claims" the Court [in *Washington v. Davis*] mentioned neither § 1981 nor cases construing that statute. Nor can it be said that in resolving the equal protection question before it, the Court necessarily resolved the § 1981 claim on the same basis. 566 F.2d at 1339-40 (footnotes omitted).

*See also, Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 838 n.22 (D.C. Cir. 1977) (plaintiff not required to meet burden of proof enunciated in *Washington v. Davis* when action is based upon Title VII and 42 U.S.C. § 1981).

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[3]The fact that *Washington* only concerns a question of constitutional law is even more explicit in this passage from this Court's opinion: "[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than that of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone it does not trigger the rule, . . . that racial classifications are to be subjected to the strictest scrutiny and are justified only by the weightiest of considerations." 426 U.S. at 242.

## III.

## USE OF RACE-CONSCIOUS REMEDIES TO ELIMINATE THE EFFECTS OF PAST RACIAL DISCRIMINATION IS NOT CONSTITUTIONAL

Invoking the Fourteenth Amendment of the Constitution, petitioners assert that the District Court's use of race-conscious guidelines in setting limitations on the layoffs planned by the City of Boston was a violation of the constitutional rights of white protective service employees. The implication of petitioners' argument is that there is something unprecedented about the District Court's use of race-conscious guidelines in resolving the layoff problem. Nothing could be further from the truth.

To begin with, the Constitution does not require the courts to ignore race when fashioning remedies for past discrimination. As the court in *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5 Cir. 1966), *modified on other grounds*, 380 F.2d 385 (5 Cir.), *cert. denied*, 389 U.S. 840 (1967), eloquently observed:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color-blind. But *the Constitution is color conscious to prevent discrimination being perpetuated and to unduo the effcts of past discrimination.* 372 F.2d at 876, (emphasis added).

Similarly, in *Stotts, supra*, the court pointed out that:

> "No decision of the Supreme Court has ever adopted the proposition that the Constitution must be color-blind. . . . *On the contrary, the Supreme Court has approved race-conscious affirmative action in a wide variety of situations where it is an attempt to amelio-*

*rate the effects of past discrimination.*" 679 F.2d at 553 (emphasis added, citations omitted).

Thus, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18-25 (1971), this Court rejected the argument that the courts are required to act in a color-blind fashion when formulating school desegregation remedies on the ground that consideration of race is an unavoidable starting point when fashioning such remedies. Similarly, in *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971), the Court observed that the process of fashioning remedies for discrimination in the schools will "almost invariably" include student assignments based upon race and that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes."

The importance of race-conscious remedies in alleviating the effects of past discrimination was unequivocally demonstrated when this Court struck down a state law that absolutely prohibited assignment of students on the basis of race because the law interfered with the implementation of desegregation plans designed to remedy racial discrimination. *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971).

Consistent with the foregoing, the courts have routinely used race-conscious remedies in alleviating racial discrimination in employment contexts. *See e.g., Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976) *Talbert v. Richmond*, 648 F.2d 925 (4 Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Valentine v. Smith*, 654 F.2d 503 (8 Cir.), *cert. denied*, 454 U.S. 1124 (1981); *Detroit Police Officers' Association v. Young*, 608 F.2d 671 (6 Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

Of course, race-conscious remedies are not constitutionally permissible in every situation. Such a remedy must be necessary to effectuate a compelling governmental inter-

est. In the case at bar, however, the District Court's use of race-conscious guidelines in establishing limitations on the layoffs was definitely related to a compelling governmental interest and was absolutely required to effectuate the original, remedial decrees.

The original decrees were designed to eliminate the massive racial imbalance existing in the Boston police and fire departments as of 1974. Where, as here, racial imbalance is a function of discriminatory conduct, the objective of alleviating that imbalance is not only constitutionally permissible but is also *affirmatively required. Stotts, supra*, 679 F.2d at 553; *Talbert, supra*, 648 F.2d at 931; *Detroit Police Officers' Association, supra*, 608 F.2d at 694-98; *Baker v. City of Detroit*, 483 F.Supp. 930, 988 (E.D. Mich. 1979).

The race-conscious guidelines adopted by the District Court were also necessary to preserve the objective of correcting racial imbalance in Boston's protective service departments. Preservation of the status quo was not an excessive grant of relief given the fact that minority representation was already well below the target established by the original consent decrees and would have dipped even further if layoffs according to strict reverse seniority had been permitted. In situations like this, where racial imbalance is highly disproportionate, the use of race-conscious remedies is viewed as particularly appropriate. *Stotts, supra*, 679 F.2d at 553.

Petitioners assert that the District Court went beyond permissible constitutional boundaries in two respects. First, they contend that the District Court improperly acted to preserve the effect of its original decrees because the City's proposed layoffs according to strict seniority were not motivated by an intent to discriminate against minorities. As Section I(C) of this brief establishes, however, a finding of intentional discrimination is not necessary in order to enforce the specific terms of the original

consent decrees and *Washington v. Davis, supra*, 426 U.S. 229 (1976), does not support petitioners' argument to the contrary.

Second, petitioners claim that the District Court exceeded what it was permitted to do under the Constitution because its modification of the original consent decrees operates to preserve the jobs of minority officers and firefighters who may not have been victims of the discriminatory tests and eligibility lists utilized prior to 1974. They characterize the District Court's action as a grant of "constructive seniority" and argue that such an award is impermissible absent a finding that the minorities protected by the decrees are the same people who were victimized prior to 1974. Petitioners misconceive both the nature of the problem which the District Court was attempting to correct and the nature of the remedy which the District Court adopted in order to resolve the problem.

The *problem* is racial imbalance not racial discrimination against specific individuals. The *solution to the problem* is, at the very minimum, to preserve the gains made thusfar by minorities as a group. In this situation, "[t]he societal interest in eliminating employment discrimination is 'sufficient in itself to justify relief directed at classes rather than individual victims of discrimination. . . .'" *Baker, supra*, 483 F.Supp. at 993, *quoting, EEOC v. A.T.&T. Co.*, 556 F.2d 167, 175 (3 Cir. 1977), *cert. denied sub nom, Communications Workers of Am. v. EEOC*, 438 U.S. 915 (1978). Here, the District Court had the additional justification that the parties *agreed* to class relief without limiting it to identifiable victims of the discriminatory evidence. *See*, Section II(B), *supra*.

## IV.

## THE DISTRICT COURT'S MODIFICATION OF THE CONSENT DECREES DID NOT UNREASONABLY INTERFERE WITH THE RIGHTS OR EXPECTATIONS OF WHITE PROTECTIVE SERVICE EMPLOYEES

### A. The Seniority Rights Of White Protective Service Employees Were Tainted By Discriminatory Hiring Practices And The Continuing Effects Thereof

In making the claim that the District Court improperly applied the balancing test, petitioners shape their arguments as if the seniority rights of white protective service employees in Boston accrued in a vacuum. They assume, and invite this Court to assume, that these seniority rights were accumulated in a racially-neutral fashion. From this premise, petitioners proceed to the conclusion that the purportedly "neutral" seniority rights of white protective service employees outweigh the public interest in desegregation of the Boston police and fire departments.

Petitioners overlook the fact that, *but for* the discriminatory hiring practices which triggered this litigation and *but for* the continuing effects of that past discrimination, the distribution of seniority rights between white and minority protective service employees would be far different from that in existence in 1981. As the Court of Appeals observed in its opinion below, "whites as a group reaped significant advantages in the past in promotion and hiring at the expense of blacks and hispanics. . . ." *NAACP v. Beecher, supra,* 679 F.2d at 977. One of the *most* significant advantages conferred upon this group was preferential position on the seniority lists.

The small group of minority police officers and firefighters currently employed by the City of Boston were the "last hired" for the sole reason that no appreciable number of minorities were hired before 1974 as a result of a discriminatory set of hiring practices. Thus, the disparity in

starting dates between white and minority protective service employees is nothing more than the mirror image of the discriminatory conditions which existed prior to 1974.

It follows from the foregoing that although the concept of seniority (i.e., classification of employees based on time in service) may be facially-neutral, its application in this case is not. The distribution of jobs between whites and minorities was drastically skewed *in favor of whites* prior to 1974 because of discriminatory conduct. After 1974, starting dates continued to reflect the old discriminatory conditions notwithstanding the remedial impact of the consent decrees. Thus, "time in service" is tainted by the past discrimination and the proposed layoffs based upon "time in service" would have been equally tainted.

### B. The District Court Correctly Concluded That The Interest Of White Protective Service Employees In Their Seniority Rights Are Outweighed By Other Considerations

It should be reiterated that the original consent decrees were designed to alleviate the massive racial imbalance in the Boston police and fire departments which was the result of discriminatory hiring practices. *NAACP v. Beecher, supra,* 679 F.2d at 976. The layoffs threatened the objective of the original decrees—i.e., racial balance—because they were to be based upon criteria which mirrored the imbalance existing prior to 1974. Those criteria are the very seniority rights championed by petitioners on this appeal and therefore carry little weight in deciding whether the District Court's limitation on the layoffs was appropriate.

The fact that white protective service employees may have formed expectations concerning their seniority rights which went unfulfilled because of the District Court's action adds nothing to petitioners' position. A similar argument was made and rejected in *Franks, supra,* 424 U.S. 747. There, an employer sought to avoid giving retroactive

seniority to a class of discriminatees on the ground that such relief would conflict with the economic interests of other employees. 424 U.S. at 773. This Court, speaking through Mr. Justice Brennan, rejected the argument on the ground that:

> [I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make whole" objective of Title VII. . . . [W]e find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. *Id.* at 774-75.

Petitioners' claim that the District Court's modification of the consent decrees unduly interfered with the expectations of white protective service employees is particularly unpersuasive given the fact that those expectations arose out of the discriminatory state of affairs which existed prior to 1974. The court in *Baker, supra,* 483 F.Supp. 930, reached the same conclusion about an identical argument. There, white police officers challenged a voluntary affirmative action plan calling for realignment of seniority rights between white and minority officers. In rejecting the plaintiffs' claim that the City's action unduly interfered with their legitimate expectations, the Court observed: "It is true that affirmative action upsets the expectations of white workers, but *such expectations are indeed tainted when they are based upon a legacy of discrimination.*" 483 F.Supp. at 1002 (emphasis added). The court went on to point out that white officers had received an unexpected "bonus" when the police department gave them unearned promotions in 1970 as part of the discriminatory conduct and it held that "[w]hite officers cannot reasonably complain when the

Department, on a finding of past discrimination and operational need, decided to confer a 'bonus' on blacks in 1974 and subsequent years." *Id.*

Similarly, in *Stotts, supra,* 679 F.2d 541, the court rejected the proposition that a consent decree which accelerated minority eligibility for promotions unduly interfered with the expectations of non-minorities. The court observed that "[a] simple reduction in the 'expectations' [of non-minorities] does not . . . necessarily make a consent decree unreasonable" and it went on to hold that the harm suffered by incumbent non-minority employees because of the promotional goal was de minimus. 679 F.2d at 556.

> Non-minorities allege that the 1980 Decree's 20% promotion goal unduly interferes with their expectations of promotion. It appears, however, that the expectation of non-minorities is based upon a pre-decree minority promotion ratio which presumptively would have been significantly higher had the City's employment practices been non-discriminatory. The 1980 Decree eliminated only *a portion* of the promotional expectations of non-minorities which were presumptively based on the City's discriminatory promotional practices. *Id.* (emphasis in the original).

Here, as in *Baker* and *Stotts*, the expectations of white protective service employees are based upon a pre-decree situation caused by discriminatory conduct and the lingering effects of that situation. To the extent that the District Court's limitation on layoffs interfered with those expectations, it did not adversely affect any legally protected interest of white employees. As the Court of Appeals for the Second Circuit observed in discussing Title VII, "[i]f relief . . . can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *United States v.*

*Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2 Cir. 1971). *Accord, Franks, supra,* 424 U.S. at 775.

Petitioners seek to bolster their arguments by asserting that the white protective service employees affected by the District Court's restrictions on layoffs are innocent of any discriminatory conduct. Assuming *arguendo* that this is the case, even innocent white employees must bear their fair share of the burdens involved in alleviating the effects of past discrimination. As Mr. Justice Brennan wrote in *Franks, supra*, "a sharing of the burden of the past discrimination is *presumptively* necessary" and "is entirely consistent with any fair characterization of equity jurisdiction." 424 U.S. at 777 (emphasis added). Similarly, this Court, speaking through Mr. Chief Justice Burger, held in *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980), that "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, . . . 'a sharing of the burden' by innocent parties is not impermissible."

In view of the foregoing, any comparison of the benefits to be derived by white employees from enforcement of their seniority rights on the one hand and the public benefit in racially balanced police and fire departments on the other must result in the conclusion that the public benefit is by far the overriding consideration. To begin with, desegregation of this society's major institutions is a great national policy of the highest priority. *Franks, supra*, 424 U.S. at 779. Desegregation of the institutions involved in this litigation is particularly important because they are *public* entities charged with the responsibility of protecting the lives and the property of the citizens of Boston.

> [*P*]*erhaps the most critical consideration in our view is that this is not a private employer and not simply an exercise in providing minorities with equal employment opportunities. This is a police department* and the visibility of the black patrolmen is a decided ad-

> vantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement. *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333, 1341 (2 Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (emphasis added).

The court in *Detroit Police Officers' Association, supra*, 608 F.2d 671 explained the nature of the benefits to be derived from racially balanced protective service departments as follows:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to public's desires. Rather, it is that *effective crime prevention and solution depends heavily upon public support and cooperation which result only from public respect and confidence in the police.* In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions. 608 F.2d at 696 (emphasis added).

Even the United States Department of Justice, appearing herein as an amicus curiae for petitioners, recognizes that racially balanced protective service departments promote vital governmental interests.

> Ideally, every city's police department should reflect the racial-ethnic make up of the community. . . . [P]olice should make every effort to develop a representative force. United States Department of Justice Community Relations Service, *Police Use of Deadly Force: A Conciliation Handbook for Citizens and the Police* at 16 (1982).

Layoffs of minority protective service employees in derogation of affirmative action consent decrees would completely frustrate efforts to desegregate police and fire departments and thwart efforts to improve police and fire

protection in ethnically mixed communities. Moreover, such layoffs would contribute to the devastating economic crisis plaguing minority groups in this country.

In the current, depressed, economic climate, minorities are experiencing the highest levels of unemployment they have had to endure in the past twenty five years and they are experiencing unemployment at a much higher rate than whites. At the end of the first year of this recession, 18.5% of the minority population of the country was unemployed while unemployment among whites was 8.4%. *See*, Exhibit A, *infra*, at page 27.[4] During the first year of the recession, minorities lost their jobs at a rate 1.77 times faster than whites. *Id.*

Significantly, minorities do not return to the work force during recoveries as quickly as they leave it during the recessions. During the years 1957-82, minorities were generally the first fired during recessions and the last rehired in the recoveries. *Id.*[5] For example, during the 1973-75 recession, minorities lost their jobs 1.75 times faster than whites. During the 1975-80 recovery period, however, minorities returned to work only .89 times as fast as whites. *Id.* In the last recovery period (1980-81), the recovery rate in the minority labor force was so sluggish that minorities were *losing their jobs* 1.4 times faster than whites were *obtaining* jobs. *Id.*

The history of the recovery periods demonstrates that minorities cannot be laid off in a recession on the assumption that they will be rehired or will find new jobs as soon

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[4]According to the United States Department of Labor, the current recession began in the second quarter of 1981. Exhibit A, *infra*, at page 27.

[5]The only exception was the 1961-69 recovery period. In the preceding recession (1960-61) minorities left the work force at a rate of 1.88 times faster than whites. When the economy recovered, they returned to the work force 2.23 times faster than whites.

as the economy begins to recover. Rather, it must be recognized that minorities laid off during a recession will remain unemployed far longer than whites laid off at the same time.

Measured against these factors, the interests of white protective service employees in enforcement of their seniority rights do not support the relief they seek. A program of layoffs based upon strict seniority would benefit white police officers and firefighters *only* because it would fulfill their expectations, expectations based upon the discriminatory conditions which existed prior to 1974 and the continuing effect of those conditions. Under these circumstances, the argument that the District Court acted improperly when it refused to allow the City of Boston to make the proposed layoffs according to strict reverse seniority is clearly specious.

## CONCLUSION

For the foregoing reasons, amici respectfully submit that this appeal must be dismissed or, alternatively, that the decisions of the lower courts must be affirmed.

Respectfully submitted,

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EXHIBIT A

## MINORITY-NONMINORITY JOBLESS RATES AND INCREMENTAL RATIO OF MINORITY-NONMINORITY UNEMPLOYMENT DURING RECESSIONS AND RECOVERIES—1957-1982

| | Beginning Unemployment | | Ending Unemployment | | Absolute Percentage Point Change | | Incremental* Ratio |
|---|---|---|---|---|---|---|---|
| | Min. | NonMin. | Min. | NonMin. | Min. | NonMin. | |
| **Recessions** | | | | | | | |
| 1957 I—1958 II | 7.4% | 3.6% | 13.4% | 6.6% | 6.0% | 3.0% | 2.00 |
| 1960 II—1961 II | 9.9 | 4.7 | 12.9 | 6.3 | 3.0 | 1.6 | 1.88 |
| 1969 IV—1975 II | 6.2 | 3.3 | 10.1 | 5.5 | 3.9 | 2.2 | 1.77 |
| 1973 IV—1975 II | 8.6 | 4.3 | 14.2 | 8.2 | 5.6 | 3.9 | 1.44 |
| 1980 I—1989 IV | 11.8 | 5.5 | 13.9 | 6.7 | 2.1 | 1.2 | 1.75 |
| 1981 II—1982 II | 14.6 | 6.2 | 18.5 | 8.4 | 3.9 | 2.2 | 1.77 |
| **Recoveries** | | | | | | | |
| 1958 II—1960 II | 13.4 | 6.6 | 9.9 | 4.7 | 3.5 | 1.9 | 1.84 |
| 1961 II—1969 IV | 12.9 | 6.3 | 6.2 | 3.3 | 6.7 | 3.0 | 2.23 |
| 1971 IV—1973 IV | 10.1 | 5.5 | 8.6 | 4.3 | 1.5 | 1.2 | 1.25 |
| 1975 II—1980 I | 14.2 | 8.2 | 11.8 | 5.5 | 2.4 | 2.7 | .89 |
| 1980 III—1981 II | 13.9 | 6.7 | 14.6 | 6.2 | −.7 | .5 | −1.40** |

Sources: 1957-81 statistics obtained from United States Department of Labor, *Employment and Training Report of the President* (1982). 1982 statistics obtained from United States Department of Labor, *Employment and Earnings* (1982).

*Incremental ratio equals the absolute percentage point change for minorities divided by the absolute percentage point change for nonminorities. Result is the rate at which minorities leave/enter the workforce as compared to the rate for nonminorities.

**Since the unemployment rates of the two groups moved in opposite directions during this period, this incremental ratio means that minorities entered unemployment at 1.4 times the rate nonminorities left unemployment.

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